

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES PRATER,)	CASE NO. 4:10CV3068
)	
Petitioner,)	
)	
v.)	MEMORANDUM
)	AND ORDER
STATE OF NEBRASKA, Robert P.)	
Houston, NDCS,)	
)	
Respondent.)	

The court has conducted an initial review of the Petition for Writ of Habeas Corpus (Filing No. [1](#)) to determine whether the claims made by Petitioner are, when liberally construed, potentially cognizable in federal court. Petitioner has made one claim.

Condensed and summarized for clarity, the claim asserted by Petitioner is that he was denied due process of law and the effective assistance of counsel in violation of the Sixth Amendment *because* Petitioner's trial counsel (a) failed to effectively impeach or otherwise challenge the trial testimony introduced against Petitioner; (b) failed to present character witnesses and other evidence on Petitioner's behalf; and (c) raised Petitioner's previous arrest during voir dire.

Liberally construed, the court preliminarily decides that Petitioner's claim is potentially cognizable in federal court. However, the court cautions that no determination has been made regarding the merits of this claim or any defenses thereto or whether there are procedural bars that will prevent Petitioner from obtaining the relief sought.

Petitioner also seeks the appointment of counsel. (Filing Nos. [4](#) and [8](#).) "There is neither a constitutional nor statutory right to counsel in habeas proceedings; instead, [appointment] is committed to the discretion of the trial court." [McCall v. Benson, 114 F.3d](#)

754, 756 (8th Cir. 1997). As a general rule, counsel will not be appointed unless the case is unusually complex or the petitioner's ability to investigate and articulate the claims is unusually impaired or an evidentiary hearing is required. See, e.g., Morris v. Dormire, 217 F.3d 556, 558-59 (8th Cir. 2000), cert. denied, 531 U.S. 984 (2000); Hoggard v. Purkett, 29 F.3d 469, 471 (8th Cir. 1994) (citations omitted). See also Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts (requiring appointment of counsel if an evidentiary hearing is warranted.) The court has carefully reviewed the record and finds that there is no need for the appointment of counsel at this time.

Also pending before the court are two Motions for Leave to Proceed In Forma Pauperis ("IFP") (Filing Nos. 5 and 7) and a Motion for a Bill of Exceptions (Filing No. 9). Petitioner paid the \$5.00 filing fee in this matter May 19, 2010. (See Docket Sheet.) The Motions for Leave to Proceed IFP are therefore moot. In his Motion for a Bill of Exceptions, Petitioner seeks documents from the Clerk of the Douglas County, Nebraska District Court. (Filing No. 9.) If Petitioner seeks documents from that court, he should contact it directly to determine the process for obtaining copies. This court does not have the records requested.

IT IS THEREFORE ORDERED that:

1. Upon initial review of the Petition (Filing No. 1), the court preliminarily determines that Petitioner's claim, as set forth in this Memorandum and Order, is potentially cognizable in federal court;
2. The Clerk of the court is directed to mail copies of this Memorandum and Order and the Petition to Respondents and the Nebraska Attorney General by regular first-class mail;
3. By July 19, 2010, Respondent shall file a motion for summary judgment or state court records in support of an answer. The Clerk of the court is

directed to set a pro se case management deadline in this case using the following text: July 19, 2010: deadline for Respondent to file state court records in support of answer or motion for summary judgment.

4. If Respondent elects to file a motion for summary judgment, the following procedures shall be followed by Respondent and Petitioner:
 - A. The motion for summary judgment shall be accompanied by a separate brief, submitted at the time of the filing of the motion.
 - B. The motion for summary judgment shall be supported by such state court records as are necessary to support the motion. Those records shall be contained in a separate filing entitled: "Designation of State Court Records in Support of Motion for Summary Judgment."
 - C. Copies of the motion for summary judgment, the designation, including state court records, and Respondent's brief shall be served upon Petitioner *except* that Respondent is only required to provide Petitioner with a copy of the specific pages of the record which are cited in the Respondent's brief. In the event that the designation of state court records is deemed insufficient by Petitioner, Petitioner may file a motion with the court requesting additional documents. Such motion shall set forth the documents requested and the reasons the documents are relevant to the cognizable claims.
 - D. No later than 30 days following the filing of the motion for summary judgment, Petitioner shall file and serve a brief in opposition to the motion for summary judgment. Petitioner shall submit no other documents unless directed to do so by the court.
 - E. No later than 30 days after the filing of Petitioner's brief, Respondent shall file and serve a reply brief. In the event that the Respondent elects not to file a reply brief, he should inform the court by filing a notice stating that he will not file a reply brief and that the motion is therefore fully submitted for decision.
 - F. If the motion for summary judgment is denied, Respondent shall file an answer, a designation and a brief that complies with terms of this order. (See the following paragraph.) The documents shall be filed no later than 30 days after the denial of the motion for summary judgment. **Respondent is warned that the failure to file an answer, a designation and a brief in a timely fashion may result in the imposition of sanctions, including the release of the petitioner.**

5. If Respondent elects to file an answer, the following procedures shall be followed by Respondent and Petitioner:
 - A. By July 19, 2010, Respondent shall file all state court records which are relevant to the cognizable claims. See, e.g., [Rule 5\(c\)-\(d\) of the Rules Governing Section 2254 Cases in the United States District Courts](#). Those records shall be contained in a separate filing entitled: "Designation of State Court Records In Support of Answer."
 - B. No later than 30 days after the filing of the relevant state court records, Respondent shall file an answer. The answer shall be accompanied by a separate brief, submitted at the time of the filing of the answer. Both the answer and brief shall address all matters germane to the case including, but not limited to, the merits of Petitioner's allegations that have survived initial review, and whether any claim is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, a statute of limitations, or because the petition is an unauthorized second or successive petition. See, e.g., [Rules 5\(b\) and 9 of the Rules Governing Section 2254 Cases in the United States District Courts](#).
 - C. Copies of the answer, the designation, and Respondent's brief shall be served upon the petitioner at the time they are filed with the court *except* that Respondent is only required to provide the petitioner with a copy of the specific pages of the designated record which are cited in Respondent's brief. In the event that the designation of state court records is deemed insufficient by Petitioner, Petitioner may file a motion with the court requesting additional documents. Such motion shall set forth the documents requested and the reasons the documents are relevant to the cognizable claims.
 - D. No later than 30 days following the filing of Respondent's brief, Petitioner shall file and serve a brief in response. Petitioner shall submit no other documents unless directed to do so by the court.
 - E. No later than 30 days after the filing of Petitioner's brief, Respondent shall file and serve a reply brief. In the event that Respondent elects not to file a reply brief, he should inform the court by filing a notice stating that he will not file a reply brief and that the merits of the petition are therefore fully submitted for decision.
 - F. The Clerk of the court is directed to set a pro se case management deadline in this case using the following text: August 11, 2010: check for respondent to file answer and separate brief.

6. No discovery shall be undertaken without leave of the court. See [Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts](#); and
7. Petitioner's Motions to Appoint Counsel (Filing Nos. [4](#) and [8](#)), Motions for Leave to Proceed In Forma Pauperis (Filing Nos. [5](#) and [7](#)), and Motion for a Bill of Exceptions (Filing No. [9](#)) are denied.

DATED this 1st day of June, 2010.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge

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